

Honorable Joseph C. Welty  
Criminal Department Presiding Judge  
Superior Court of Arizona, Maricopa County  
175 W. Madison St.  
Phoenix, AZ 85003  
(602) 372-2537

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

} Supreme Court No. R-14-\_\_\_\_

}  
} PETITION TO AMEND RULE 32.4  
} OF ARIZONA RULES OF  
} CRIMINAL PROCEDURE  
}

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Criminal Department Presiding Judge of the Superior Court of Arizona in Maricopa County, respectfully petitions this Court to adopt the attached proposed amendment to Rule 32.4 of the Arizona Rules of Criminal Procedure.

In *Stout v. Taylor*, 233 Ariz. 275, 278 ¶ 14, 311 P.3d 1088, 1091 (App. 2013), the Court of Appeals held that the meaning of the word “transcript” in Rule 32.4(d) of the Arizona Rules of Criminal Procedure “means a written verbatim record of proceedings and does not include electronic recordings.” The opinion noted that Rule 11(a)(1) of the Arizona Rules of Civil Appellate Procedure, allows an electronic recording or a certified transcript to be used as the record if authorized by the appellate court. In addition, the opinion set forth some policy reasons for allowing the use of electronic recordings in post conviction relief proceedings:

We acknowledge that various policy arguments support the use of electronic recordings in lieu of transcripts when appropriate playback equipment is available. An electronic recording may arguably be the functional equivalent of a transcript. Moreover, the rules have created different rights for pleading defendants than for non-pleading

1 defendants, without any readily apparent basis for the distinction.  
2 Indigent defendants who have pled guilty and subsequently pursue  
3 of-right petitions for post-conviction relief will get transcripts under  
4 Rule 32.4(d), while other indigent defendants convicted of criminal  
5 offenses may be required under the rules for direct appeals to the  
6 superior court (such as Rule 7) to accept electronic recordings instead  
7 of transcripts. Additionally, requiring of-right post-conviction relief  
8 petitioners to use electronic recordings is unlikely to prejudice them  
9 in the preparation of their petitions. Finally, providing recordings  
10 instead of transcripts may be less expensive while still achieving the  
11 overarching policy of Rule 32.4(d): providing adequate access to  
12 judicial review.

13 *Id.* at ¶ 15.

14 For the foregoing policy reasons, the Superior Court of Arizona in  
15 Maricopa County requests to amend Rule 32.4(d) of the Arizona Rules of  
16 Criminal Procedure as follows:

17 **d. RECORDTranscript Preparation.** If the trial court proceedings  
18 have not been previously ~~transcribed~~ PREPARED, the defendant  
19 may request on a form provided by the clerk of court that THE  
20 RECORD ~~certified transcripts be prepared~~. The court shall  
21 expeditiously review the request and order only those  
22 RECORDINGS OR transcripts prepared that it deems necessary to  
23 resolve the issues to be raised in the petition. The preparation of the  
24 RECORD ~~transcripts shall be at county expense if the defendant is~~  
25 indigent. The time for filing the petition shall be tolled from the time  
26 a request for the RECORD ~~transcripts~~ is made until the RECORD IS  
27 MADE AVAILABLE ~~transcripts are prepared~~ or the request is  
28 denied. RECORDINGS SHALL BE MADE AVAILABLE OR  
certified transcripts shall be prepared and filed within sixty days of  
the order granting the request.

29 In addition to the policy reasons provided in *Stout v. Taylor* and quoted above,  
30 amending Rule 32.4(d) as provided above and in Exhibit A to allow a trial court,  
31 at its discretion, to either provide access to appropriate playback equipment or an

1 electronic recording of the proceeding or a certified transcript, would reduce  
2 workload to court employees and expense to the county.

3 Many change of plea and sentencing proceedings are electronically  
4 recorded in Superior Court. Likewise, many notices of post conviction relief  
5 result in a notice of completion filed by counsel without a petition being filed.  
6 Each of these notices on plea cases requires the superior court to transcribe at  
7 least two, if not more, proceedings at county expense. The technology exists to  
8 allow the Superior Court to provide indigent defense counsel access to electronic  
9 recordings of the proceedings. These are short proceedings and would not be  
10 burdensome to review by electronic recording. If no issue is found and no  
11 petition is going to be filed, creating a certified transcript is an unnecessary  
12 expense.

13 The proposed change still allows for a certified transcript to be prepared if  
14 one is necessary, such as a request made by an incarcerated pro per defendant  
15 who does not have the ability to review an electronic recording based on prison  
16 policy.

17 For the foregoing reasons, the Criminal Department Presiding Judge of the  
18 Superior Court in Maricopa County respectfully requests this Court amend Rule  
19 32.4 to allow trial courts to provide an electronic recording or a certified  
20 transcript in post conviction relief proceedings.

21 Respectfully submitted this 10th day of January, 2014.

22 /s Joseph C. Welty

23  
24 Hon. Joseph C. Welty  
25 Criminal Department Presiding Judge  
Superior Court of Arizona, Maricopa County

26 Electronic copy filed with the Clerk  
27 of the Supreme Court of Arizona  
28 this 10<sup>th</sup> day of January, 2014.

Exhibit A

Rules of Criminal Procedure

**Rule 32.4. Commencement of proceedings**

**a. Form, Filing and Service of Petition.** A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of all post-conviction relief proceedings. In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h). The notice shall bear the caption of the original criminal action or actions to which it pertains. On receipt of the notice, the court shall file a copy of the notice in the case file of each such original action and promptly send copies to the defendant, the county attorney, the defendant's attorney, if known, and the attorney general or the prosecutor, noting in the record the date and manner of sending the copies. If the conviction occurred in a court other than the Superior Court, the copy shall be sent to the office of the prosecuting attorney who represented the state at trial. The state shall notify any victim who has requested notice of post-conviction proceedings.

**b. Notification of Appellate Court.** If an appeal of the defendant's conviction, sentence, or both is pending, the clerk, or the court, within 5 days after the filing of the notice for post-conviction relief, shall send a copy of the notice to the appropriate appellate court, noting in the record the date and manner of sending the copies.

**c. Appointment of Counsel.**

(1) *Capital Cases.* After the Supreme Court has affirmed a defendant's conviction and sentence in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the

defendant is determined to be indigent. If the appointment is made by the presiding judge, a copy of the court's order appointing counsel shall be filed in the Supreme Court.

Upon the filing of a successive notice, the presiding judge shall appoint the previous post-conviction counsel of the capital defendant unless counsel is waived or good cause is shown to appoint another qualified attorney from the list described in A.R.S. § 13-4041.

On the first notice in capital cases, appointed counsel for the defendant shall have 12 months from the filing of the notice to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have 12 months from the filing of the notice to file a petition. On the filing of a successive notice, appointed counsel, or the defendant if proceeding without counsel, shall file the petition within thirty days from the filing of the notice. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days may be granted for good cause. If a petition for post-conviction relief is not filed within 12 months from the date of appointment of counsel, or 12 months from the date the notice is filed, or the date a request for counsel is denied if the defendant is proceeding without counsel, the defendant or counsel for the defendant shall file a notice in the Supreme Court, advising the court of the status of the proceedings. Thereafter, defendant or counsel for the defendant shall file status reports in the Supreme Court every sixty days until the petition for post-conviction relief is filed.

(2) *Rule 32 of-right and non-capital cases.* Upon the filing of a timely or first notice in a Rule 32 proceeding, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. In non-capital cases appointed counsel for the defendant shall have sixty days from the date of appointment to file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.

In a Rule 32 of-right proceeding, counsel shall investigate the defendant's case for any and all colorable claims. If counsel determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination. Counsel's role is then limited to acting as advisory

1 counsel until the trial court's final determination. Upon receipt of the notice, the  
2 court shall extend the time for filing a petition by the defendant in propria  
3 persona. The extension shall be 45 days from the date the notice is filed. Any  
4 extensions beyond the 45 days shall be granted only upon a showing of  
extraordinary circumstances.

5 A defendant proceeding without counsel shall have sixty days to file a petition  
6 from the date the notice is filed or from the date the request for counsel is denied.

7 **d. RECORDTranscript Preparation.** If the trial court proceedings have not been  
8 previously ~~transcribed~~ PREPARED, the defendant may request on a form  
9 provided by the clerk of court that THE RECORD ~~certified transcripts~~ be  
10 prepared. The court shall expeditiously review the request and order only those  
11 RECORDINGS OR transcripts prepared that it deems necessary to resolve the  
12 issues to be raised in the petition. The preparation of the RECORD ~~transcripts~~  
13 shall be at county expense if the defendant is indigent. The time for filing the  
14 petition shall be tolled from the time a request for the RECORD ~~transcripts~~ is  
made until the RECORD IS ~~transcripts are~~ prepared or the request is denied.  
15 RECORDINGS OR ~~c~~Certified transcripts shall be prepared and filed within sixty  
16 days of the order granting the request.

17 **e. Assignment of Judge.** The proceeding shall be assigned to the sentencing judge  
18 where possible. If it appears that the sentencing judge's testimony will be relevant,  
19 that judge shall transfer the case to another judge.

20 **f. Stay of Execution of Death Sentence; Notification by Supreme Court.** If the  
21 defendant has received a sentence of death and the Supreme Court has fixed the  
22 time for execution of the sentence, no stay of execution shall be granted upon the  
23 filing of a successive petition except upon separate application for a stay to the  
24 Supreme Court, setting forth with particularity those issues not precluded under  
25 Rule 32.2. The Clerk of the Supreme Court shall notify the defendant, the  
26 Attorney General, and the Director of the State Department of Corrections of the  
27 granting of a stay.  
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